No. ~~1057~~ 55

In the Supreme Court of the United States

OCTOBER TERM, 1966 67

THOMAS EARL SIMMONS AND
ROBERT JAMES GARRETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

257-559—67

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 371 F. 2d 296.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1966. A petition for rehearing was denied on January 23, 1967. The petition for a writ of certiorari was filed on February 21, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether F.B.I. agents used improper investigative techniques when they asked robbery witnesses

on several occasions if they found pictures of the robbers among sets of photographs.

2. Whether the trial court was correct in ruling that the pictures shown to the eyewitnesses were not producible under 18 U.S.C. 3500.

3. Whether testimony of petitioner Garrett at a hearing on his motion to suppress evidence was properly admitted into evidence at trial.

STATUTE INVOLVED

18 U.S.C. 3500 provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. * * *
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> * * * * * *
>
> (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners and William Earl Andrews were convicted of robbery of a federally insured savings and loan association, in violation of 18 U.S.C. 2113. On April 6, 1965, petitioners were sentenced to imprisonment for ten years, petitioner Garrett's term to commence upon completion of a sentence being served in the State of Tennessee. The court of appeals affirmed petitioners' convictions, but reversed as to Andrews.

The evidence showed that on February 27, 1964, at approximately 2:00 p.m., two men entered the Ben Franklin Savings and Loan Association in Chicago (Tr. 45, 135, 168, 274).[1] As they approached a teller window, another teller waved one of the men, later identified as Simmons, to her counter (Tr. 274). Simmons first requested a money order. Then he pointed a gun at the teller, and ordered her to put money in a blue cloth sack which he provided (Tr. 274). As the teller was filling the bag other employees of the bank began to realize that a robbery was taking place. Simmons, pointing his gun at a second teller, warned everyone to remain still and

[1] "Tr." refers to the two-volume "Transcript of Proceedings" filed with the Clerk of this Court.

avoid pressing the alarm buzzer, or he would shoot (Tr. 46, 136, 169). The teller who filled the bag gave it to the second man, later identified as Garrett (Tr. 277). The robbers then left the bank.

Shortly after the robbery, one of the tellers advised F.B.I. agents that the robbers had driven off in a white 1960 Thunderbird automobile (Tr. 49). The agents learned that a car fitting the description of the getaway vehicle belonged to the sister of William Earl Andrews (and sister-in-law of petitioner Simmons).

At trial, five prosecution witnesses, on direct examination, made positive identifications of petitioners in the courtroom, and some described their appearances at the time the offense was committed (Tr. 45, 47, 137–139, 169–170, 172, 275–277, 330, 333). On cross-examination it was shown that, late in the day of the robbery and the next day, F.B.I. agents had interviewed the five witnesses—the bank's comptroller and four tellers. Questioned individually, the employees were shown sets of pictures from which each identified one to three of Simmons (Tr. 77–79, 146–147, 251, 287–288, 356).[2] A few weeks later, and on other occasions, the agents returned to the bank and again placed a number of pictures[3] before the wit-

[2] On the afternoon of the robbery, F.B.I. agents visited the home of Mrs. Mahon, Andrews' mother. They obtained some snapshots of Simmons from another of Andrews' sisters (Tr. 508).

[3] The exact number of pictures shown to the witnesses apparently varied with each witness. One testified that she viewed "fifty or more" (Tr. 255). Another stated that she was shown 10 to 20 pictures, from which she identified Garrett as one of the robbers (Tr. 302–303). This witness also noted

nesses, requesting that they attempt to select those of the robbers. Prior to displaying the pictures, the agents did not reveal to the witnesses any information uncovered during the investigation of the robbery (Tr. 254, 290). Each time the witnesses positively identified Simmons as one of the robbers (Tr. 257, 302–303, 359–361). Two of the tellers and the bank's comptroller also identified pictures of Garrett (Tr. 259, 292–293, 303, 371).

During the investigation on the evening of the robbery, a house belonging to Mrs. Mahon, Andrews' mother, was searched with her consent. In the basement of the house F.B.I. agents found two suitcases. Mrs. Mahon denied any knowledge of the ownership of the suitcases and could not explain their presence in the basement (Tr. 229–230). She consented to having them opened and removed from the house. In one suitcase (Gov't Exh. 4) the agents found clothing, a gun holster, a blue sack, several coin cards and bill wrappers bearing the name of the victimized bank or numbers corresponding to account numbers of some of the bank's depositors, and a cigarette carton on which was stamped "Pulaski, Tennessee" (the home town of both petitioners) (Tr. 413–420). At trial it was shown that at a hearing on a motion by Garrett to suppress evidence pertaining to the suitcases and the contents of Government Exhibit 4,

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that she was shown four or five pictures of Simmons and Garrett shortly before the trial (Tr. 295). The comptroller testified that a week and a half before trial government counsel showed her four pictures, of which one or two were of Simmons and none of Garrett (Tr. 361).

Garrett had identified the clothes found in that suitcase as his, although he could not definitely identify the suitcase itself (Tr. 182–183).

ARGUMENT

1. Petitioners' contention (Pet. 8–12) that the F.B.I. investigation was biased because the agents exhibited several pictures of them to the eyewitnesses on the day of the robbery and several times thereafter is without foundation. There is no evidence that the witnesses were coached or otherwise induced to choose pictures of Simmons or Garrett from the selection of photographs shown them. It is hardly surprising that the eyewitnesses would be able to identify pictures of the robbers a short time after the crime had been committed, especially in light of the fact that they had made no attempt to mask their identities.

Petitioners were not identified by their pictures alone; the witnesses also gave the agents descriptions of their physical characteristics and their manner of speaking. The witnesses correctly identified petitioners at trial even though they daily changed positions in the courtroom with their co-defendant Andrews (who was never identified by any of the robbery eyewitnesses), and on one occasion Andrews and Simmons wore similarly colored suits (Tr. 563). All of these circumstances clearly distinguish this situation from *Palmer* v. *Peyton*, 359 F. 2d 199 (C.A. 4), relied upon by petitioners (Pet. 10), where there was never a visual identification of the defendant, either in open court or by means of a lineup or

photographs, and where the complaining witness identified the defendant solely by describing the shirt which he owned as similar to one worn by her assailant, and by hearing his voice alone from another room.

2. On cross-examination of the four tellers and the bank's comptroller, defense counsel elicited testimony that each had given statements to the F.B.I. and that each had identified one or both petitioners from photographs furnished by the agents. After each witness so testified, petitioners moved for production of the statements under 18 U.S.C. 3500. In addition, counsel requested that all of the photographs shown by the agents to the witnesses be produced. When the first such request was made, government counsel expressed willingness to attempt to locate the pictures from the F.B.I. and turn them over to the defense counsel. However, the trial judge, after reviewing the witness' written statement, concluded that the photographs were not an integral part thereof and that the government was not required to produce the photographs. Accordingly, he decided not to delay the trial until the pictures were obtained, and ordered defense counsel to continue his cross-examination. After eliciting testimony from subsequent witnesses that they, too, had viewed pictures, defense counsel moved under 18 U.S.C. 3500 for their production. Each time his motion was denied.

The term "statement" is defined in 18 U.S.C. 3500 as (1) a written statement signed or otherwise adopted or approved by the witness; or (2) a substantially verbatim recital of an oral communication of the wit-

ness recorded contemporaneously with the making of the oral statement (see *supra*, pp. 2–3). Photographs do not fall within either of these definitions, and thus are not producible. *Palermo* v. *United States*, 360 U.S. 343. See also *Ahlstedt* v. *United States*, 325 F. 2d 257 (C.A. 5), certiorari denied, 377 U.S. 968. Apart from the fact that photographs are not writings, they do not originate with the witness and are not ordinarily his communications. While in some situations a photograph might be so interrelated to a statement as to make it producible in order to make the statement understandable, the trial court specifically found that no such situation was involved here.

In presenting its case, the government relied upon the courtroom identification and did not bring out the fact that the witnesses had earlier identified photographs of petitioners. The jury first learned about the photographs on cross-examination of these witnesses. Defense counsel, who had been given copies of the written statements of the witnesses, conducted lengthy examinations of these individuals. In these circumstances, not only was the court justified in ruling that the photographs did not fall within 18 U.S.C. 3500; it also appears that petitioners can show no prejudice from the absence of the photographs.

3. Petitioner Garrett had no interest in the house which was searched and was not present when the search was conducted. He had no permission from the owner to leave articles there, and she did not identify the suitcase admitted in evidence as Garrett's

(Gov't Exh. 4).[4] Nevertheless, he moved to suppress the evidence as to the suitcase and articles found therein, claiming that the clothes contained in one of the suitcases belonged to him. He now asserts that, since he had to make some claim of ownership in order to have standing to move to suppress, it was error to admit in evidence against him the testimony, including the admission of ownership of the clothes, which he voluntarily made at the hearing on the motion to suppress. It has, however, long been held that testimony voluntarily given in support of an unsuccessful motion to suppress may be offered against the movant as an admission against interest. *United States* v. *Taylor,* 326 F. 2d 277 (C.A. 4), certiorari denied, 377 U.S. 931; *Monroe* v. *United States,* 320 F. 2d 277 (C.A. 5), certiorari denied, 375 U.S. 991; *Fowler* v. *United States,* 239 F. 2d 93 (C.A. 10); *Kaiser* v. *United States,* 60 F. 2d 410 (C.A. 8), certiorari denied, 287 U.S. 654; *Heller* v. *United States,* 57 F. 2d 627 (C.A. 7), certiorari denied, 286 U.S. 567; *Connolly* v. *Medulie,* 58 F. 2d 629, 630 (C.A. 2). See *Jones* v. *United States,* 362 U.S. 257, 262. Any defendant who takes the stand for any purpose is to a greater or lesser extent on the horns of a dilemma since anything he says may, in the instant proceeding or in another context, be used against him. The dilemma presented by testifying in support of a motion to suppress has, for the most part, evaporated by reason of this Court's decision in *Jones* v. *United States,*

[4] The trial judge advised the jury that the evidence pertaining to Government Exhibit 4 was admissible only as to Garrett (Tr. 400).

362 U.S. 257. There the Court held that anyone legitimately on premises where a search occurs and anyone charged with a possessory crime has, without further showing, standing to contest a search (362 U.S. at 263–267). Thus, only in a case such as this, where, on the surface, no interest of person or property appears to have been involved, would it be necessary for the movant affirmatively to allege an interest in the property taken. In that situation, where a defendant not charged with possession of property can show no interest in the premises searched, it seems reasonable that one who wishes, for his own purposes, to assert an interest in property taken should be held to the normal consequences of his voluntary statements, *i.e.*, that they are admissible in evidence against him.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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